IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.107 OF 1990

Sau. Mangal Suresh Kanase ...Appellant
Vs.
Shri Suresh Dadu Kanase ...Respondent

Shri N.J. Patil for the Appellant.
Shri P.N. Karlekar for the Respondent.

CORAM : ABHAY S. OKA, J.

DATE ON WHICH JUDGMENT IS RESERVED : MAY 05, 2006.

DATE ON WHICH JUDGMENT IS PRONOUNCED: JUNE 08, 2006.

JUDGMENT:

1. This First Appeal arises out of an unfortunate dispute between the wife and the husband. The challenge in this Appeal is to the judgment and decree dated 11th July, 1988 passed by the learned Judge of the City Civil Court, Mumbai in a Petition filed under section 13(1)(ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as the said Act of 1955).

2. The marriage between the Appellant-wife and the Respondent-husband was solemnised on 28th May, 1978. According to the case of the Respondent, after solemnisation of the marriage the Appellant and the Respondent resided at the native place of the Respondent for a period of fifteen days. Subsequently, both of them returned to Mumbai and

started residing together at Mumbai. According to the case of the Respondent, on 20th February, 1979 at about 06.00 p.m. the Appellant left the matrimonial home and did not come back since then. It is the case of the Respondent that he made frantic efforts to search the Appellant. He gave an advertisement in the local newspaper and also filed police complaint. Some time in the year 1979, the Respondent learnt that the Appellant was working as maid servant at Prabhadevi in Mumbai. He requested the Appellant to return to the matrimonial home but the Appellant refused to come back.

3. In the Petition filed for divorce by the Respondent, the Appellant remained absent and therefore, the Appellant did not cross-examine the Respondent. A Decree of divorce was passed by the learned Trial Judge on the ground that there was no cross-examination of the Respondent and the evidence of the Respondent has gone unchallenged. On 30th March, 1990 the Appeal was admitted and was fixed for final hearing in the last week of July 1990. It must be stated here that in the present Appeal an Application for condonation of delay was made by the Appellant as there was a delay in filing the Appeal. Said Application for condonation of delay was allowed

by order dated 06th December, 1989. A Letters Patent Appeal was filed for challenging the order passed on delay condonation Application. The said Appeal was allowed and Application for condonation of delay was ordered to be heard afresh by the learned Single Judge of this Court. Thereafter, the delay was condoned and Appeal was admitted. In Civil Application No.3809 of 1999 filed for staying of execution and operation of the decree of divorce. rule was issued on 23rd August, 1989. The Application appears to have been adjourned on number of occasions. The order passed on Civil Application on 23rd August, 1989 reads thus:

> "Rule. Until return of rule in four weeks stay."

I find that after service of rule, no further ad-interim or interim stay has been granted.

4. This Appeal was called out before me for final hearing on 23rd March, 2006. Appeal was heard on that day and also on 10th April, 2006. On that day a submission was made apart from other submissions on merit, that while passing the decree of divorce the Trial Court has not passed an order for payment of permanent alimony under section 25 of the Hindu

Marriage Act, 1955. A submission was made by the Appellant that even if this court was inclined to confirm the decree, an order may be passed under section 25 of the said Act of 1955. In view of the said request, the Appellant was permitted to file an affidavit placing on record the claim for maintenance. The Respondent was directed to place on record the particulars of salary received by him from his employer from the year 1988 till today. The Respondent was also permitted to file reply to the affidavit filed by the Appellant. The Appellant has filed an Affidavit claiming permanent alimony of Rs.5,000/- per month. The Respondent has not filed any Affidavit. However, the Respondent has produced a letter dated 03rd May, 2006 addressed to this Court by his employer enclosing therewith the details of salary drawn by the Respondent from January 2005 to March 2006.

5. The learned Advocate appearing for the Appellant submitted that the ex-parte decree has been passed for divorce in most unfortunate circumstances. He submitted that though an Advocate was appointed by the Appellant after receiving summons of the divorce petition, the said Advocate did not file vakalatnama. Therefore, a decree was passed by the reason of the

absence of the Appellant. He submitted that on plain reading of the averments made in the divorce petition, it was obvious that no ground for grant of divorce was available. He submitted that the Respondent-husband was an employee of the Brihan Mumbai Electric Supply and Transport Undertaking (for short BEST) and was drawing handsome salary. He also invited my attention to the order passed by this Court granting maintenance at the rate of Rs.200/- per month to the Appellant in a Petition arising out of proceedings under section 125 of the Code of Criminal Procedure, 1973.

6. The learned Advocate appearing for the Respondent submitted that the Appellant was negligent and never bothered to attend the proceedings of divorce petition. He submitted that after grant of divorce the Respondent has happily remarried. He stated that the Respondent is residing with his wife and two daughters. It is stated that the elder daughter has appeared for H.S.C. examination and the younger daughter is studying in 7th standard. He submitted that the take-home salary of the Respondent is not more than Rs.6,000/- to Rs.7,000/- after taking into account all the legitimate deductions. He submitted that the Respondent has to spend large amount on the education of his daughters. He

submitted that the Appellant is already getting maintenance at the rate of Rs.200/- per month and no case for grant of more maintenance was made out. He submitted that even assuming that the Appellant has any case, at this stage, the decree of divorce cannot be set aside in view of the fact that the Respondent has re-married and has two grown up daughters.

7. The Advocate appearing for the Appellant submitted that maintenance at the rate of Rs.200/- per month has been awarded by this Court after considering situation which was prevailing in the year 1988 and today it is impossible for the Appellant to survive on the basis of such paltry amount of maintenance. He submitted that the salary received by the Respondent is more than Rs.20,000/- per month.

8. I have considered the submissions. It is unfortunate that the Appeal has remained pending for a period of more than sixteen years. It may be possible to argue that a decree of divorce passed in absence of the Appellant should not be allowed to stand. However, in the present case, the marriage was solemnised on 28th May, 1978 and from February 1979 the parties are residing separately. The decree passed by the Trial Court is now operating from July

1988 i.e. for last about eighteen years. In the meanwhile, the Respondent has re-married and he has two grown up daughters. Ad-interim stay was granted to the decree of divorce until return of the rule. Thereafter, the ad-interim relief was not extended though the Application for stay appeared on board on several occasions. Therefore, though the decree of divorce is ex-parte, it is impossible to set aside the said decree at this stage.

9. Now the only question which survives is whether the Appellant is entitled to permanent alimony under section 25 of the said Act of 1955 and if it is held that she is held entitled to alimony, how much should be the quantum. It must be stated here that it is not at all the case of the Respondent that the Appellant has re-married or that she has any source of income. It will be necessary to refer to the decision of this Court in Criminal Writ Petition No.1147 of 1992. The said decision dated 04th February, 2000 and 11th February, 2000 discloses that an Application was made by the Appellant under section 125 of the said Code. The said Application was decided by the learned Judicial Magistrate, First Class. The said Application was allowed in the year 1988 and maintenance of Rs.200/- per month was awarded to the

Appellant. The order of maintenance was set aside in Revision by the Sessions Court and therefore, the said Writ Petition was filed. This Court set aside the order of the Sessions Court and restored the order passed by the learned Magistrate. The learned Single Judge of this Court while allowing the Petition filed by the Appellant restored the order of the learned Magistrate granting maintenance at the rate of Rs.200/- per month. Perusal of the said judgment shows that there is no finding regarding the quantum of the income of the Respondent during the period subsequent to the date of the order impugned in the said Writ Petition. This court has simply restored the order of maintenance passed in the year 1988. The material which is now placed on record by the Respondent is in the form of true certified copies of the salary slips of the Respondent produced by the employer of the Respondent. The said salary slips are for the period between January 2005 to March 2006. The said slips show that in January 2005 the total salary payable to the Respondent was Rs.22,026.68/- and after deducting a sum of Rs.16,286.68/- the net salary drawn by the Respondent was Rs.5,740.00/-. From June 2005 to March 2006 except for January 2006 the net salary drawn by the Respondent is between Rs.8,000/- to Rs.9,000/- per month.

10. In view of this position, in absence of any material on record showing income prior to January 2005, it is difficult to award permanent alimony at a rate more than Rs.200/- per month from the date of passing the decree till December 2004. From the date of passing the decree till 31st December, 2004, the Appellant will be entitled only to the maintenance awarded under the orders of this court referred to above. However, from January 2005 onwards the order for payment of higher amount will have to be made on the basis of the evidence of income produced by the Respondent himself. Considering the fact that the parties have lived together only for few months and considering the size of the family of the Respondent, the permanent alimony payable from January 2005 will have to be fixed at Rs.1,250/- per month in addition to maintenance at the rate of Rs.200/- per month which is already granted. A reasonable time will have to be granted to pay the arrears of permanent alimony. Over and above the said amount of Rs.1,250/-, the Respondent will have to pay a sum of Rs.200/- per month awarded under section 125 of the said Code. The Respondent will have to also pay costs of proceedings of this Appeal to the Appellant which is quantified at Rs.7,500/-.

11. Hence, I pass the following order:

(i) The impugned judgment and decree of divorce is confirmed.

(ii) The Respondent is directed to comply with the judgment and order dated 04th/ 11th February, 2000 passed by this Court in Criminal Writ Petition No.1147 of 1992 so long as the said order is in force. If there are any arrears payable as of today in terms of the said order, the Respondent will pay the said amount of arrears within period of three months from today.

(iii) In addition to maintenance payable under the order of this Court in Criminal Writ Petition No.1147 of 1992, the Respondent will pay a permanent alimony of Rs.1,250/- per month from January 2005 to the Appellant. The Respondent will pay arrears of permanent alimony from January 2005 to 31st May, 2006 within a period of six months from today. The payment of permanent alimony at the rate of Rs.1,250/-

from June 2006 will be made on or before 15th day of every calendar month.

(iv) The Respondent will pay costs of Rs.7,500/- of the proceedings of the First Appeal to the Appellant. The said amount shall be paid within a period of six weeks from today.

(v) Appeal is disposed of in above terms.

(vi) Parties to act upon an authenticated copy of this order.

JUDGE